1 2 3 5 BEFORE THE 6 BOARD OF PHARMACY DEPARTMENT OF CONSUMER AFFAIRS 7 STATE OF CALIFORNIA 8 In the Matter of the Accusation Against: Case No. 3884 9 **DEFAULT DECISION AND ORDER** 10 CLAYTON EUGENE WHEELER 11 [Gov. Code, §11520] 326 Lorraine Court Sebastopol, CA 95472 12 Pharmacist License No. RPH 28905 13 14 Respondent. 15 16 FINDINGS OF FACT 17 1. On or about April 5, 2011, Complainant Virginia Herold, in her official capacity as 18 the Executive Officer of the Board of Pharmacy, Department of Consumer Affairs, filed 19 Accusation No. 3884 against Clayton Eugene Wheeler (Respondent) before the Board of 20 Pharmacy. (A copy of the Accusation is attached as Exhibit A.) 21 2. On or about July 17, 1990, the Board of Pharmacy (Board) issued Pharmacist License 22 No. RPH 28905 to Respondent. The License was in full force and effect at all times relevant to 23 the charges brought in Accusation No. 3884 and will expire on March 31, 2012, unless renewed. 24 3. On or about April 11, 2011, Respondent was served by Certified and First Class Mail 25 with copies of: Accusation No. 3879; a Statement to Respondent, a Notice of Defense (2 copies); 26 a Request for Discovery; and Discovery Statutes (Gov.Code, §§ 11507.5, 11507.6, 11507.7) at 27 Respondent's address of record, which was and is: 326 Lorraine Court, Sebastopol, CA 95472. 28 ///

- 4. Pursuant to Business and Professions Code section 136 and/or 4100, and/or California Code of Regulations, title 16, section 1704, Respondent's address of record, and any changes thereto, are required to be reported and maintained with the Board of Pharmacy (Board).
- 5. Service of the Accusation was effective as a matter of law under Government Code section 11505, subdivision (c) and/or Business & Professions Code section 124.
 - 6. Government Code section 11506 states, in pertinent part:
 - (c) The respondent shall be entitled to a hearing on the merits if the respondent files a notice of defense, and the notice shall be deemed a specific denial of all parts of the accusation not expressly admitted. Failure to file a notice of defense shall constitute a waiver of respondent's right to a hearing, but the agency in its discretion may nevertheless grant a hearing.
- 7. Respondent failed to file a Notice of Defense within 15 days after service of the Accusation, and therefore waived his right to a hearing on the merits of Accusation No. 3884.
 - 8. California Government Code section 11520 states, in pertinent part:
 - (a) If the respondent either fails to file a notice of defense or to appear at the hearing, the agency may take action based upon the respondent's express admissions or upon other evidence and affidavits may be used as evidence without any notice to respondent.
- 9. Pursuant to its authority under Government Code section 11520, the Board finds Respondent is in default. The Board will take action without further hearing and, based on the relevant evidence contained in the Default Decision Evidence Packet in this matter, as well as taking official notice of all the investigatory reports, exhibits and statements contained therein on file at the Board's offices regarding the allegations contained in Accusation No. 3884, finds that the charges and allegations in Accusation No. 3884, are separately and severally, found to be true and correct by clear and convincing evidence.
- 10. Taking official notice of its own internal records, pursuant to Business and Professions Code section 125.3, it is hereby determined that the reasonable costs for Investigation and Enforcement is \$4,666.50 as of September 13, 2011.

DETERMINATION OF ISSUES

1. Based on the foregoing findings of fact, Respondent Clayton Eugene Wheeler has subjected his Pharmacist License No. RPH 28905 to discipline.

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- 2. The agency has jurisdiction to adjudicate this case by default.
- 3. The Board of Pharmacy is authorized to revoke Respondent's Pharmacist License based upon the following violations alleged in the Accusation which are supported by the evidence contained in the Default Decision Evidence Packet in this case.:
- a. In violation of Business and Professions Code section 4301(f), Respondent did the following acts involving moral turpitude, dishonesty, fraud, deceit, or corruption: In or between May 2009 and March 2010, Respondent stole/diverted an unknown total quantity of **Guaifenesin with Codeine**, a controlled substance, from his employer (a Kaiser pharmacy). At least some of the amount stolen/diverted was for Respondent's self-use. The total quantity stolen/diverted is not known, but Kaiser reported 30,844 mls lost due to employee pilferage.
- b. In violation of Business and Professions Code section(s) 4301(h), (j), and/or (o), and/or Health and Safety Code section 11170, Respondent, as described above, administered a controlled substance to himself;
- c. In violation of Business and Professions Code section(s) 4301(j), (o), and/or 4059, and/or Health and Safety Code section 11170, Respondent, as described above, furnished to himself or another without a valid prescription, and/or conspired, assisted or abetted furnishing of, a controlled substance, without a valid prescription;
- d. In violation of Business and Professions Code section(s) 4301(j), (o), and/or 4060, and/or Health and Safety Code section 11350, Respondent, as described above, possessed, conspired to possess and/or assisted in or abetted possession of, a controlled substance, without a valid prescription;
- e. In violation of Business and Professions Code section(s) 4301(j) and/or (o), and/or Health and Safety Code section 11173(a), Respondent, as described above, obtained, conspired t obtain and/or assisted in or abetted obtaining of, a controlled substance by fraud, deceit, subterfuge, or concealment of a material fact;
- f. In violation of Business and Professions Code section 4301, Respondent, as described above, engaged in unprofessional conduct.

ORDER IT IS SO ORDERED that Pharmacist License No. RPH 28905, heretofore issued to Respondent Clayton Eugene Wheeler, is revoked. Pursuant to Government Code section 11520, subdivision (c), Respondent may serve a written motion requesting that the Decision be vacated and stating the grounds relied on within seven (7) days after service of the Decision on Respondent. The agency in its discretion may vacate the Decision and grant a hearing on a showing of good cause, as defined in the statute. This Decision shall become effective on January 11, 2012. It is so ORDERED December 12, 2011. (. Wussi STANLEY C. WEISSER, BOARD PRESIDENT FOR THE BOARD OF PHARMACY DEPARTMENT OF CONSUMER AFFAIRS 20522746.DOC DOJ Matter ID:SF2010202897 Attachment: Exhibit A: Accusation

Exhibit A

4.

Accusation

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7	BEFORE THE
8	BOARD OF PHARMACY DEPARTMENT OF CONSUMER AFFAIRS
9	STATE OF CALIFORNIA
10	In the Matter of the Accusation Against: Case No. 3884
11	CLAYTON EUGENE WHEELER
12	326 Lorraine Court Sebastopol, CA 95472 A C C U S A T I O N
13	Pharmacist License No. RPH 28905
14	Respondent.
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16	Complainant alleges:
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18	<u>PARTIES</u>
19	1. Virginia Herold (Complainant) brings this Accusation solely in her official capacity
20	as the Executive Officer of the Board of Pharmacy, Department of Consumer Affairs.
21	2. On or about July 17, 1990, the Board of Pharmacy issued Pharmacist License No.
22	RPH 28905 to Clayton Eugene Wheeler (Respondent). The License was in full force and effect at
23	all times relevant to the charges herein and will expire on March 31, 2012, unless renewed.
24	JURISDICTION
25	3. This Accusation is brought before the Board of Pharmacy (Board), Department of
26	Consumer Affairs, under the authority of the following laws. All section references are to the
27	Business and Professions Code (Code) unless otherwise indicated.
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- 4. Section 4011 of the Code provides that the Board shall administer and enforce both the Pharmacy Law [Bus. & Prof. Code, § 4000 et seq.] and the Uniform Controlled Substances Act [Health & Safety Code, § 11000 et seq.]. Section 4300(a) of the Code provides that every license issued by the Board may be suspended or revoked.
- 5. Section 118(b) of the Code provides, in pertinent part, that the suspension, expiration, surrender, or cancellation of a license shall not deprive the Board of jurisdiction to proceed with a disciplinary action during the period within which the license may be renewed, restored, reissued or reinstated. Section 4402(a) of the Code provides that any pharmacist license that is not renewed within three years following its expiration may not be renewed, restored, or reinstated and shall be canceled by operation of law at the end of the three-year period. Section 4402(e) of the Code provides that any other license issued by the Board may be canceled by the Board if not renewed within 60 days after its expiration, and any license canceled in this fashion may not be reissued but will instead require a new application to seek reissuance.

STATUTORY AND REGULATORY PROVISIONS

- 6. Section 4301 of the Code provides, in pertinent part, that the Board shall take action against any holder of a license who is guilty of "unprofessional conduct," defined to include, but not be limited to, any of the following:
- (f) The commission of any act involving moral turpitude, dishonesty, fraud, deceit, or corruption, whether the act is committed in the course of relations as a licensee or otherwise, and whether the act is a felony or misdemeanor or not.
- (j) The violation of any of the statutes of this state, of any other state, or of the United States regulating controlled substances and dangerous drugs.
- (o) Violating or attempting to violate, directly or indirectly, or assisting in or abetting the violation of or conspiring to violate any provision or term of this chapter or of the applicable federal and state laws and regulations governing pharmacy, including regulations established by the board or by any other state or federal regulatory agency.
- 7. Section 4059 of the Code, in pertinent part, prohibits furnishing of any dangerous drug or dangerous device except upon the prescription of an authorized prescriber.

- 8. Section 4060 of the Code provides, in pertinent part, that no person shall possess any controlled substance, except that furnished upon a valid prescription/drug order.
- 9. Health and Safety Code section 11173, subdivision (a), provides that no person shall obtain or attempt to obtain controlled substances, or procure or attempt to procure the administration of or prescription for controlled substances, (1) by fraud, deceit, misrepresentation, or subterfuge; or (2) by the concealment of a material fact.
- 10. Health and Safety Code section 11350, in pertinent part, makes it unlawful to possess any controlled substance listed in Schedule II (Health and Safety Code section 11055), subdivision (b) or (c), or any narcotic drug in Schedules III-V, absent a valid prescription.
 - 11. California Code of Regulations, title 16, section 1770, states:

"For the purpose of denial, suspension, or revocation of a personal or facility license pursuant to Division 1.5 (commencing with Section 475) of the Business and Professions Code, a crime or act shall be considered substantially related to the qualifications, functions or duties of a licensee or registrant if to a substantial degree it evidences present or potential unfitness of a licensee or registrant to perform the functions authorized by her license or registration in a manner consistent with the public health, safety, or welfare."

12. Section 125.3 of the Code provides, in pertinent part, that the Board may request the administrative law judge to direct a licentiate found to have committed a violation of the licensing act to pay a sum not to exceed its reasonable costs of investigation and enforcement.

CONTROLLED SUBSTANCES / DANGEROUS DRUGS

- 13. Section 4021 of the Code states:
- "'Controlled substance' means any substance listed in Chapter 2 (commencing with Section 11053) of Division 10 of the Health and Safety Code."
 - 14. Section 4022 of the Code states, in pertinent part:
- "Dangerous drug' or 'dangerous device' means any drug or device unsafe for self use, except veterinary drugs that are labeled as such, and includes the following:
- "(a) Any drug that bears the legend: 'Caution: federal law prohibits dispensing without prescription,' 'Rx only,' or words of similar import.

"(c) Any other drug or device that by federal or state law can be lawfully dispensed only on prescription or furnished pursuant to Section 4006."

- 15. Cheratussin AC and Robitussin AC are among the brand names for a compound of the expectorant guaifenesin and codeine, a Schedule V controlled substance as designated by Health and Safety Code section 11058(c)(1) and a dangerous drug as designated by Business and Professions Code section 4022. These are also known generically as Guaifenesin with Codeine. These combinations are an expectorant cough syrup, and a narcotic analgesic.
- 16. **Percocet** and **Endocet** are among the brand names for a compound of acetaminophen (APAP) and **oxycodone**, a Schedule II controlled substance as designated by Health and Safety Code section 11055(b)(1)(N) and a dangerous drug as designated by Business and Professions Code section 4022. These are also known as **Oxycodone with APAP**. These are narcotic drugs.

FACTUAL BACKGROUND

- 17. From an unknown start date until on or about March 30, 2010, Respondent worked as a pharmacist for a Kaiser Pharmacy (PHY 46492) located in Santa Rosa, CA. For at least part of that time, and until on or about March 30, 2010, Respondent served as pharmacist in charge. As such, Respondent had access to the stock of controlled substances and dangerous drugs.
- 18. During the tenure of his employment, Respondent used his access to divert/steal controlled substances and dangerous drugs, including **Guaifenesin with Codeine**.
- 19. The exact number of instances of diversion/theft by Respondent, and the full quantity of controlled substances or dangerous drugs diverted/stolen by Respondent, are not known, but in the course of investigations by Kaiser and by the Board, the following were reported:
- a. An audit/investigation of controlled substance/dangerous drug inventory and stock on hand by Kaiser auditors/investigators determined that between in or around May 2009 and March 2010 the Kaiser Pharmacy by which Respondent was employed showed a shortage of Guaifenesin with Codeine cough syrup product(s) of approximately 30,863 mls.
- b. Covert video footage showed Respondent engaged in suspicious activity with regard to the supplies of Guaifenesin with Codeine in the pharmacy, including after hours.

- c. On unknown dates in or around February or March 2010, an empty bottle of Guaifenesin with Codeine from pharmacy stock was found in a waste basket in the pharmacy, and an unlabeled bottle from pharmacy stock containing 97 tablets of Oxycodone with APAP was found in an unlocked desk drawer in a desk used by Respondent.
- d. Respondent told Kaiser auditor/investigators and Board Inspector(s) that he was not involved in drug diversion/theft or self-use, that the video footage of his activities with regard to Guaifenesin with Codeine was because of his own after-hours investigation of possible theft or diversion by other employee(s), and that he put the Oxycodone with APAP in his desk drawer after he found it elsewhere in the pharmacy premises and/or it was returned by a customer.
- e. On or about April 12, 2010, Kaiser filed a Report of Theft or Loss of Controlled Substances (DEA Form 106) with the Drug Enforcement Administration, in which Kaiser reported losses due to employee pilferage of 129 bottles (236 mls per bottle, total of 30,844 mls) of Cheratussin AC (Guaifenesin with Codeine) and 97 tablets of Oxycodone with APAP.
- g. Respondent subsequently admitted to Board Inspector(s) that he had a problem with **Robitussin AC** (**Guaifenesin with Codeine**), and that he had diverted same from Kaiser drug stock (for self-use). Respondent reported seeking treatment/counseling for his problem.

FIRST CAUSE FOR DISCIPLINE

(Acts Involving Moral Turpitude, Dishonesty, Fraud, Deceit or Corruption)

20. Respondent is subject to discipline under section 4301(f) of the Code in that Respondent, as described in paragraphs 17 to 19 above, committed numerous acts involving moral turpitude, dishonesty, fraud, deceit, or corruption.

SECOND CAUSE FOR DISCIPLINE

(Self-Administration of Controlled Substance and/or Alcohol)

21. Respondent is subject to discipline under section 4301(h) of the Code, and/or 4301(j) and/or (o) of the Code and Health and Safety Code section 11170, in that Respondent, as described in paragraphs 17 to 19 above, administered a controlled substance to himself.

DISCIPLINE CONSIDERATIONS

26. To determine the appropriate level of discipline, if any, to be imposed on Respondent, Complainant further alleges that on or about February 2, 2002, in a prior disciplinary action titled In the Matter of the Accusation against Jerry E. Dannenberg, et al., Case No. 2243 before the Board of Pharmacy, Respondent's License was subjected to prior discipline. By a Decision and Order of the Board adopting a Stipulated Settlement, effective February 2, 2002, Respondent was issued a letter of public reprimand on the basis of allegations that Respondent gave up his right to contest, including that in his role as pharmacist in charge (PIC) of a Kaiser pharmacy, Respondent failed to keep and maintain a complete and accurate inventory of controlled substances in stock in the pharmacy (and so failed to detect a pattern of diversion and self-use by another pharmacist), and also failed to timely notify the appropriate authorities upon discovery of the diversion. That decision is now final and is incorporated by reference as if fully set forth herein.

PRAYER .

WHEREFORE, Complainant requests that a hearing be held on the matters herein alleged, and that following the hearing, the Board of Pharmacy issue a decision:

- 1. Revoking or suspending Pharmacist License Number RPH, issued to Clayton Eugene Wheeler (Respondent);
- 2. Ordering Respondent to pay the Board the reasonable costs of the investigation and enforcement of this case, pursuant to Business and Professions Code section 125.3;
 - 3. Taking such other and further action as is deemed necessary and proper.

DATED: 4/5/1/

VIRGINIA HEROLD Executive Officer

Board of Pharmacy

Department of Consumer Affairs

State of California

Complainant

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